



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

January 3, 2023

By ECF and Email

The Honorable P. Kevin Castel
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Juan Orlando Hernandez, a/k/a "JOH," S7 15 Cr. 379 (PKC)

Dear Judge Castel:

The parties jointly write with respect to the April 24, 2023 trial date and other upcoming deadlines currently scheduled in this matter. The defense respectfully requests that the Court adjourn the trial to a date in July or August 2023. In light of the considerations outlined below, the Government agrees that a brief adjournment of the trial date is appropriate, and believes that an adjournment to approximately mid-June 2023 is sufficient.

The Government has produced voluminous discovery materials to the defense, amounting to over a terabyte of data, beginning in June 2022 and continuing on a rolling basis. The Government understands that the defense is in the process of reviewing this very large volume of materials. The Government anticipates that it will further supplement its discovery productions to date, including with classified materials. The Government initiated the process for defense counsel to obtain the requisite clearances to view the classified materials in June 2022 and understands that defense counsel is in the process of submitting necessary forms to obtain his clearances. The Classified Information Security Officer has advised the Government that, once those forms have been received, defense counsel's clearance process is expected to take (on an expedited basis) approximately 60 to 90 days. In light of the volume of unclassified discovery materials, the anticipated forthcoming classified discovery productions and expected timing of defense counsel securing the necessary clearances, and the defense's need to review all of these materials, in addition to the substantial amount of 18 U.S.C. § 3500 material the Government anticipates producing, the defendant requests that the Court adjourn the April 24, 2023 trial date to a date convenient to the Court in July or August 2023. In light of these circumstances, the Government does not object to the adjournment request; the Government respectfully notes its view that, to the extent convenient for the Court, a trial date in mid-June 2023 (as opposed to July or later) would be appropriate and account for the considerations outlined herein.

The Government respectfully requests that the Court also adjourn the date for the Government to file its motion pursuant to Section 4 of the Classified Information Procedures Act (“CIPA”) from February 1, 2023 to March 17, 2023. The Government continues to consult and coordinate with the relevant components of the U.S. Government and the Department of Justice, which have informed the Government that they will need until March 17, 2023 to complete their review processes for the materials at issue and to prepare and submit necessary declarations associated with the Section 4 motion. *See United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008) (requiring that the “state secrets” privilege must be “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer” (internal quotation marks omitted)). The Government’s proposed adjournment of the trial date to mid-June 2023 will allow sufficient time for the Government to file and the Court to consider and rule on the Section 4 motion in advance of trial; for defense counsel to obtain the requisite security clearances and complete review of the Government’s anticipated production of classified discovery; and for the parties and the Court to conduct and complete any litigation under Section 5 and Section 6 of CIPA following the Section 4 motion and in advance of trial. *See* 18 U.S.C. app. 3 §§ 5(a), 6(a), 6(c). Defense counsel objects to this request.¹

Finally, if the Court adjourns the trial date as proposed, the parties respectfully request corresponding adjournments of the pre-trial deadlines, which currently are set as follows:

- March 3, 2023: The Government’s requests to charge, voir dire, 404(b) notice, and any motions *in limine*;
- March 21, 2023: The defendant’s response to the Government’s submissions and any requests to charge, voir dire, and motions *in limine*;
- March 24, 2023: The Government’s production of § 3500 material, absent a request to the Court to delay the production of any such material; and
- April 4, 2023: The Government’s reply to the defendant’s submissions.

The Court also scheduled a final pre-trial conference for April 12, 2023 at 2:00 p.m., which the parties respectfully request be rescheduled to a date corresponding with the proposed adjournment of the trial date.

¹ The Government is available, if the Court wishes, to provide additional information about the Government’s review of classified materials and anticipated CIPA § 4 motion in an *ex parte* classified CIPA § 2 conference. As the Court is aware, it is proper for the Court, at a party’s request or on its own initiative, to hold “a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution.” 18 U.S.C. app. 3 § 2; *see United States v. Abu-Jihaad*, 630 F.3d 102, 143 (2d Cir. 2010) (proper for district court to conduct *in camera*, *ex parte* proceedings in connection with CIPA § 4 motion); *United States v. Abu-Jihaad*, No. 07 Cr. 57 (MRK), 2007 WL 2972623, at *1 (D. Conn. Oct. 11, 2007) (collecting cases in which “numerous courts have upheld the propriety of *ex parte*, *in camera* proceedings in cases involving classified information”); *see, e.g., United States v. Saipov*, No. S1 17 Cr. 722 (VSB), 2019 WL 5558214, at *2 (S.D.N.Y. Oct. 29, 2019) (proper for court to hold *ex parte*, classified CIPA § 2 conferences).

Should the Court grant the requested adjournment, the Government moves to exclude time under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A), between April 24, 2023 and the new trial date. The Government respectfully submits that the exclusion would be in the interests of justice as it would allow the Government to continue producing discovery materials and for the defendant to review discovery, and for the parties to engage in the preparation and filing of the motions discussed above. The defendant consents to the requested exclusion of time.

Respectfully submitted,

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